

**UT 99-3**

**Tax Type: Use Tax**

**Issue: Pollution Control Equipment (Exemption)**

**DEPARTMENT OF REVENUE  
STATE OF ILLINOIS  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS**

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**DEPARTMENT OF REVENUE  
STATE OF ILLINOIS**

v.

**"ABC ENERGY CORPORATION.",**

Taxpayer

97 ST 0000  
0000-0000  
Claim for Credit

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Messrs. Brian Wolfberg and Jerome Wiener of Schain, Firsell & Burney, Ltd., for "ABC Energy Corp.; Mr. Mark Dyckman, Special Assistant Attorney General, for the Illinois Department of Revenue

**Synopsis:**

"ABC Energy Corporation" (hereinafter referred to as "ABC" or the "Taxpayer") filed a Claim for Credit (hereinafter referred to as the "Claim") for a refund of monies it paid in use tax for certain tangible personal property it claims as exempt from such tax pursuant to the Use Tax Act's (35 ILCS 105/1 *et seq.*) (hereinafter referred to as the "UTA") pollution control facilities provision. 35 ILCS 105/2a

At hearing, the parties offered into evidence a Stipulation (Joint Ex. No. 1). Mr. "Harold Hill", a "ABC" engineer (hereinafter referred to as "Hill"), testified on behalf of

the taxpayer.<sup>1</sup> Following the submission of all evidence and a review of the record,<sup>2</sup> it is recommended that this matter be resolved in favor of the Department. In support of this recommendation, I make the following findings of fact and conclusions of law:

**Findings of Fact:**

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, is established by the admission into evidence of the Notice of Tentative Denial of Claim (hereinafter referred to as the "Denial") which indicates that the Department denied taxpayer's claim for \$439,682.00 in tax covering the period of 1/xx-12/xx. Department Ex. No. 1; Tr. pp. 12-13
2. The tax claimed is based upon projections made and agreed upon by the auditor and taxpayer for the years 19xx and 19xx, as well as those amounts and items reflected in Taxpayer Ex. No. 3, with exceptions conceded by taxpayer at hearing and noted on that Exhibit. Stipulation, par. 1
3. The amounts at issued herein are based upon use tax paid by "ABC" to the Department. "ABC" bore the burden of such amounts and did not shift the burden to any other person. Stipulation, par. 2
4. "ABC" is a company which is "involved in the generation, transmission and sale of "energy" primarily in the "boondocks" of Illinois." Tr. p. 16

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<sup>1</sup> Mr. "Hill" was qualified as an expert in the area of prevention, reduction and elimination of radiation exposure. Tr. pp.22-23

5. Taxpayer is subject to state and federal regulation, specifically dealing with taxpayer's control of radiation, a pollutant generated in the course of its business by its nuclear facility. Tr. pp. 23-24
6. There are two types of dosimeters at issue-the first is a survey instrument which records the radiological conditions of an area (Tr. pp. 21-22, 25-26) and the second is a personal dosimeter which an individual wears on his person for measuring both the rate that he is receiving radiation exposure and the amount of radiation received. Tr. p. 22
7. A survey dosimeter is usually shoebox size (Tr. p. 51) and is carried by a technician into an area wherein work is anticipated to be done. *Id.* This instrument shows where radiation is coming from. Tr. p. 52 These instruments include air monitors that take air samples (*id.*) and "smears" which are pieces of paper rubbed on areas of the rooms to determine if there is any loose contamination therein. *Id.* The smears are read by a survey dosimeter. *Id.* A survey dosimeter lasts for years. Tr. p. 53
8. The survey dosimeter reads the level of radiation in the environment; it does not change the radiation level in the environment. Tr. pp. 54-55
9. A personal or electronic dosimeter is typically a little larger than a cigarette pack, and is clipped to the person performing the work. Tr. p. 59 It is programmed to measure the rate at which the person is receiving radiation exposure (Tr. p. 60) and it is set at a limit for the person's accumulated total exposure. *Id.* When either limit is reached, the

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<sup>2</sup> Following hearing, the parties filed memorandum of law. Taxpayer initiated with "Taxpayer's Post Hearing Memorandum" followed by the "Department's Post-Hearing Brief" and concluding with the

dosimeter alarms. *Id.* When the alarm goes off, the individual is required to leave the area. Tr. p. 79

10. The personal dosimeter does not change the level or type of radiation, but, rather, alerts the person that his personal radiation limitations have been reached or the level of radiation in the environment exceeds what was expected. Tr. pp. 61-62
11. All persons within a radiation control area have a personal dosimeter. Tr. pp. 62-65
12. Neither type of dosimeter is connected to anything that eliminates or reduces the level of radiation in an area. Tr. p. 69 Rather, the primary purpose of each dosimeter is to collect data. Tr. p. 68
13. "ABC" is required, by law, to do surveys that, *inter alia*, evaluate the extent, concentration or quantities of radioactive material. 10 CFR §20.1501; Tr. pp. 25-26
14. "ABC" is required, by law, to monitor an individual's exposure to radiation and radioactive material to demonstrate compliance with Federal occupational dose limits, and to do so with individual dosimeters. 10 CFR §20.1502; Tr. pp. 26-27
15. "ABC" is required, by law, to "develop, document, and implement, a radiation protection program commensurate with the scope and extent of licensed activities..." (10 CFR §20.1101 (a)) and "shall use, to the extent practicable, procedures and engineering controls based upon sound radiation protection principles to achieve occupational doses and doses to

members of the public that are as low as is reasonably achievable (ALARA).” *Id.* at §20.1101 (b); Tr. pp. 27-28

16. Of the four types of radiation which exist (Tr. pp.29-30, 31), none of them can be smelled, tasted, seen, heard or felt by humans. Tr. p. 31
17. There is some form of low radiation around us in our environment. Tr. p. 31
18. "ABC" has a five part system to comply with radiation exposure regulations:
  1. the work to be done is defined, i.e. to replace a valve, to make an inspection. Tr. p. 33
  2. the area wherein the work is needed to be done is assessed as a radiological environment-that is, *inter alia*, a dosimeter is used to take measurements of the air environment. *Id.*
  3. the job constraints are defined-that is, limits are placed on the work in general, and on the individual assigned to the job to properly protect him from unacceptable exposure. Tr. pp. 33-34 These constraints include limiting the time the individual will spend in the environment and specifying the type of clothing to be worn (Tr. pp. 55-56, 58) or deciding whether respiratory protection is necessary. Tr. p. 56 Depending on the level of radiation in the environment, "ABC" may choose to have a robot do the work (Tr. pp. 56-57), may wait until the

levels of radiation diminish (Tr. p. 56) or may install shielding.

Tr. p. 57

4. the work is done with the individual doing the work wearing a dosimeter measuring both the rate and the amount of radiation exposure received (Tr. p. 34) and a technician will monitor the environment to insure that the radiological conditions have not changed from the original assessment. Tr. pp. 34-35

5. the finished job is assessed as to the amount of exposure to the individual, and whether the procedure used was good, *etc.* (Tr. p. 35) with the data being fed into "ABC's" ALARA program.

Tr. pp. 35-36

19. The main work constraints utilized to prevent excessive radiation exposure are time, distance and shielding. Tr. p. 71 Exposing a person to radiation for a lesser period of time does not reduce the level of radiation in the work environment. Tr. p. 72 Moving the person away from the radiation source does not reduce the level of radiation in the work environment, but is done to move the person into an area of lesser radiation. Tr. p. 73

20. "ABC's" purpose in this five-part system is to accomplish the work necessary to its end of producing energy without exposing its personnel to radiation levels in excess of regulation limitations. Tr. pp. 70, 71

21. Taxpayer concedes that the exemption sought in this matter does not apply to the following items on its claims list (Taxpayer Ex. No. 3; Tr. pp. 38-42)

Invoice No.	1623	p-5 comm item	p. 1
	195241	parts for veltron 2000	
	p. 1		
	119351	silica monitor	
	p. 4		
	7332	hr meter, get p.o.	p. 4
	005532	timer and receiver	
	p. 4		
	7013	dustmaler level sensor	p. 4

22. The remaining tangible personal property on the claims list (Taxpayer Ex. No. 3) fall into five categories, according to their purposes (Taxpayer Ex. No. 3-A):

- a. Spare Parts And/Or Repair Services – tangible personal property used to fix, repair or enhance the dosimeters (Tr. pp. 44-45)
- b. Decontamination Equipment and Support Material – tangible personal property used to clean radioactive material from dosimeters (Tr. pp. 45-46)
- c. Remote Monitoring and Support Material – tangible personal property that monitors the environment in which work is being done to assess whether the survey originally done remains valid (Tr. pp. 46-47)

- d. Dosimetry Support Equipment – various appurtenances to dosimeters, including velcro cloth jackets for attachment to the person (Tr. pp. 47-48)
- e. Dosimeters – either the survey or personal type ( Tr. p. 48) including air sampling monitors which sample the air so as to determine if respiratory protection is necessary in the space when the job is being done (Tr. pp. 48-49)

**Conclusions of Law:**

Section 3 of the UTA provides for a tax on the privilege of using, in Illinois, tangible personal property purchased at retail from a retailer. 35 ILCS 105/3 Taxpayer filed the claim at issue seeking exemption from the imposition of the use tax, pursuant to the pollution control facilities exemption of the UTA (35 ILCS 105/2a) (hereinafter referred to as the “exemption”) on its purchase of dosimeters and related items of tangible personal property.

Prior to a discussion of the application of the specific law concerning this exemption to the facts herein, it is necessary to set forth the well-settled parameters of the law relating to tax exemptions. In Illinois, tax exemption provisions are strictly construed against the taxpayer and in favor of the taxing body (Telco Leasing, Inc. v. Allphin, 63 Ill.2d 305 (1976)) with the exemption claimant having to clearly and conclusively prove entitlement to the exemption (United Air Lines, Inc. v. Johnson, 84 Ill.2d 446 (1981); Chicago Bar Ass’n v. Department of Revenue, 163 Ill.2d 290 (1994)), with all doubts being resolved in favor of taxation. Follett’s Illinois Book & Supply Store, Inc. v. Isaacs, 27 Ill.2d 600 (1963)



The exemption that taxpayer seeks provides that the “purchase, employment and transfer of such tangible personal property as pollution control facilities is not a purchase, use or sale of tangible personal property” (35 ILCS 105/2a) and defines “pollution control facilities” as:

...any system, method, construction, device or appliance appurtenant thereto sold or used or intended for the primary purpose of eliminating, preventing, or reducing air and water pollution as the term “air pollution” or “water pollution” is defined in the “Environmental Protection Act”, enacted by the 76<sup>th</sup> General Assembly, or for the primary purpose of treating, pretreating, modifying or disposing of any potential solid, liquid or gaseous pollutant which if released without such treatment, pretreatment, modification or disposal might be harmful, detrimental or offensive to human, plant or animal life, or to property.

*Id.*

Taxpayer, as its business, generates and sells energy in Illinois, and uses nuclear power plants to conduct this business. In order to carry out its business purposes, "ABC" is regulated by the Federal government, as a licensee operating a nuclear facility. See 10 CFR Part 20

Radiation exists all around us. The parties agree that radiation is a contaminant and, there is also no question that when a person is exposed to radiation in quantities exceeding limitations set out in government regulations, there are serious physical consequences. Due to the very nature of "ABC's" business, radiation exists in the nuclear facility and the levels of radiation vary within different areas therein. Federal regulations mandate that this taxpayer monitor radiation levels and take precautions against overexposing its plant personnel to this pollutant. 10 CFR §20.1101, 20.1501, 20.1502, 20.1602

The dosimeters at issue record and monitor radiation levels. "ABC" needs to have personnel work in areas of varying levels of radiation. The survey dosimeters survey the area wherein personnel are to work. The amount of radiation within the area is read from the dosimeter and a plan is devised setting forth the parameters of the job-that is, how long personnel are to remain in the area and what type of equipment will be necessary to get the job done without exposing the personnel to excessive amounts of the pollutant.

The personal or electronic dosimeters are worn by the personnel within the work area, and monitor the rate and amount of exposure. The personal dosimeter is set so that if the worker is exposed to too much radiation, he is alerted and leaves the area. If it is found that the job parameters have not been appropriately set, in that the work cannot be done in the manner originally determined without overly exposing the person doing the job, then the job requirements are reassessed and a new plan is devised, perhaps changing the equipment used or adding protective shields, *etc.* Tr. pp. 60-61

The Department contends that the dosimeters basically collect data (Tr. p. 68-testimony of "Hill"), that is, they survey and monitor the facility environment after which personnel decide what job constraints need to be implemented so that a worker can work in the area without being exposed to the contaminant beyond ALARA limits. As such, the Department avers that the primary purpose of this tangible personal property is not to eliminate, prevent or reduce air and water pollution, nor is it the primary purpose of this property to treat, pretreat modify or dispose of any solid, liquid or gaseous pollutant, which, without such treatment, might be harmful or detrimental to humans, plants, animals or property, as required by the exemption statute. See, Tr. pp. 72-73 (testimony

of "Hill"-time, distance and training constraints do not reduce level of radiation in the particular work area)

"ABC", on the other hand, argues that although radiation can be a pollutant, it is not pollution until such time as it is detrimentally affects the human (Tr. pp. 72, 77-testimony of "Hill"; Taxpayer's Response, pp. 2, 3) and, that the dosimeters are part of its system, required by law, to prevent harmful doses to personnel required to work in high radiation areas. Taxpayer's Response, p. 3 Therefore, avers the taxpayer, its system, of which dosimeters are a vital part, does prevent or reduce unacceptable levels of occupational exposure to the radiation in the air and thus, prevents or reduces air pollution. (Tr. p. 78-testimony of "Hill") Although "ABC's" argument is interesting and innovative, I cannot concur.

In order to sustain its position that the surveying and monitoring equipment at issue herein qualify as part of a system that prevents or reduces air pollution, it is necessary to agree with taxpayer that radiation, in levels exceeding federal standards for ordinary human activity, is not pollution until such time that it actually adversely affects someone. To support this position, taxpayer relies on the definitions of "air pollution" and "contaminant" in the Environmental Protection Act, 415 **ILCS** 5/1 *et seq.* (hereinafter referred to as the "EPA"), that state:

§ 3.02. "Air pollution" is the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property.

415 **ILCS 5/3.02**<sup>3</sup> Section 3.06 of the EPA defines “contaminant” as “any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source.” As indicated, *supra*, the parties agree that radiation is the contaminant that is the basis of the air pollution in this matter.

Based upon these definitions, "ABC" reasons that air pollution requires more than just the existence of a contaminant. Rather, factors, including duration of exposure must be considered before the contaminant is deemed air pollution. Thus, concludes "ABC", the radiation in the work areas are not air pollution until such time that exposure to it by working personnel becomes harmful. The dosimeters, by surveying the air to help devise a plan establishing the parameters under which the worker can be in the radiation area without harmful exposure as set forth in government regulations, and by monitoring the worker's level of exposure to the radiation so that it does not exceed federal standards, are, therefore, part of a “system” preventing air pollution.

However, taxpayer's reasoning is flawed. By legislative definition, “air pollution” exists when: 1) a contaminant is present in sufficient quantities 2) in such character and duration 3) to cause injury to humans. In this case, the level and duration of the contaminant, radiation, within the work area into which personnel are required to operate, exceeds regulated limits for ordinary, human activity and this unacceptable level is not changed through the use of the dosimeters-it remains unacceptable for normal human exposure before, during and after the worker is in the space. The level of radiation within the affected space remains as injurious to humans before, during and after a reading from a dosimeter. Thus, neither the survey dosimeter nor the personal

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<sup>3</sup> The appellate court in Du-Mont Ventilating Co. v. Department of Revenue, 52 Ill. App.3d 59 (3<sup>rd</sup> Dist. 1977) determined that the word “atmosphere” as used in the EPA definition of air pollution includes air

dosimeter eliminates, prevents, reduces or treats the dangerous level of radiation within the work environment. In order to qualify for the pollution control facilities exemption, that is what is required as the primary purpose of the tangible personal property in question.

As taxpayer states, the dosimeters are part of a system which has the “sole purpose” of reducing and preventing immediate exposure and reducing or preventing future exposure to radiation pollution. Taxpayer’s Post Hearing Memorandum, p. 7; Tr. p. 65-testimony of "Hill". Taxpayer attempts to persuade that this prevention or reduction in the federally mandated “occupational dose” of radiation is the prevention or reduction of the air pollution caused by the radiation. This is in spite of the fact that the air in the environment in which the workers must to do the work does not change. It contains the same levels of radiation regardless of how long the worker is there, or regardless of whether or not protective clothing is worn.

To allow taxpayer’s argument to prevail would be to agree that a tree in a forest has not fallen if no one hears or sees it fall, or that sulfur, belching from a smoke stack in levels exceeding government standards, is not “air pollution” until such time that someone breathes enough of it or for a long enough period of time that it causes injury. I submit that levels of a contaminant exceeding government standards is “air pollution” even if no one breathes enough of it to cause injury-it is what it is whether or not someone is in the neighborhood. See Tr. p. 54 (testimony of "Hill" regarding the fact that the survey monitor tests and measures radiation in an area-the radiation level “is what it is.” When it is too high, humans have to take steps to determine what is necessary to protect the worker from over exposure.)

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within buildings.

The levels of radiation in the space where the personnel must conduct some work at "ABC" exceeds the government standards for ordinary exposure and is, therefore, "air pollution". The air in this space is no less polluted when a person wears protective gear and/or stays in the area for a time period deemed to lessen or avoid injurious effects upon him. Clothing and time constraints may make the space "safe" to work in according to ALARA, but the space is not a safe environment because of unacceptable levels of radiation which, in and of themselves, are not "safe".

Taxpayer notes three opinion letters wherein, it claims, the Department granted exemption to devices similar to the dosimeters at issue. However, its analyses of these letter rulings are incorrect, and, the position taken by the Department, that testing and monitoring equipment that are not part of a system which reacts, as its primary purpose, to prevent, eliminate, reduce, modify, treat or dispose of pollution when levels exceed acceptable standards, is consistent.

"ABC" proffers that Department Opinion Letter 95-0160<sup>4</sup> allows the exemption for "monitors which directly adjust pollution control devices, but do not serve to reduce or prevent pollution... ." Taxpayer's Post Hearing Memorandum, p. 16 The inquirer in that letter asks whether any of several different monitors, "used to determine the effectiveness of exhaust or effluent controls, and/or to allow exhaust or effluent flow to be properly monitored", qualify for the exemption at issue. The Department does not allow the exemption for those monitors which "merely monitor the quality of the emission and provide operators with readings. The operators may, based upon the readings, enlist other equipment to reduce the level of contaminants that are released."

The Department allows one exception-that being for a monitor that has “alarm relays” which “initiate the operation of external controlling devices” “described as valves, gates, alarms, [and] chlorineators... .” This ruling letter provides that:

To the extent, however, that a [monitor] could directly adjust devices that actually reduce or prevent pollution, it could qualify for the pollution control facilities exemption. However, only those [monitors] that are equipped with optional alarm relays and are used primarily to directly manipulate equipment that actually reduces or prevents pollution, would qualify for the exemption.

*Id.* This ruling letter conforms to the Department’s position herein which does not allow the exemption for the dosimeters which collect data regarding the radiation level and then monitor the level of exposure to the worker, but do not change the radiation level or prevent the radiation in the environment from exceeding regulated limits.

"ABC" also refers to General Information Letters 95-0405 and 95-0255 wherein the Department allowed the exemption for, *inter alia*, warning signs, labels and tapes if they are required by OSHA and EPA for the removal of asbestos, and for gloves and disposal clothing worn by a worker in the contaminated area for protection during asbestos and lead removal. The difference, however, between these items and the dosimeters herein is that the items inquired about in the information letters were those used in actual asbestos and lead removal. Consistent with the Department’s position in this case, those items were part of a system that actually eliminated, reduced or disposed of air pollution (asbestos being the contaminant), and, the primary purpose of those items was as part of that process of pollution removal. It is noted that in both letters, the Department specifically states that “[a]ir sampling equipment that monitors the fiber

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<sup>4</sup> Taxpayer cites this letter ruling as 95-1060. I have searched Department ruling letters and have not found this number. Opinion letter 95-160 addresses the pollution control facilities exemption and specifically, the monitoring equipment taxpayer refers to.

count in the containment area does not qualify for the exemption because it does not reduce or eliminate the asbestos. However, if the equipment actually activates a system that reduces pollution in the containment area, then the equipment will qualify for the exemption.”

Taxpayer places an emphasis on the fact that in the referenced letters, the Department allowed the exemption for signs, etc. if required by OSHA and EPA. It argues that these dosimeters, and the system they are part of for preventing occupational exposure beyond regulatory limits, are mandated by federal law, and, therefore, like the warning signs, should be exempt from use tax.

Taxpayer’s argument in this regard fails, as it is contrary to Illinois law. In order to qualify for this exemption, the “system, method, construction, device or appliance appurtenant thereto” (35 **ILCS** 105/2a) must be sold, used, or intended for the “primary purpose of eliminating, preventing, or reducing air and water pollution” (emphasis added) (*id.*) or for the “primary purpose” of treating, pretreating, modifying or disposing” of any potential pollutant. (emphasis added) (*Id.*) The “primary purpose” test seeks to determine, in an objective fashion (Shell Oil Co. v. Department of Revenue, 117 Ill. App.3d 1049 (4<sup>th</sup> Dist. 1983); Central Illinois Public Service Co. v. Department of Revenue, 158 Ill. App.3d 763 (4<sup>th</sup> Dist. 1987)) the “function and ultimate objective of the equipment alleged to be exempt”, and that “[o]nly those facilities directly involved in the pollution abatement process are to be afforded special tax status.” Central Illinois Public Service Co. v. Department of Revenue, *supra* at 768

This objective, primary purpose mandate is applied and followed specifically by every Illinois court, save one-that being Central Illinois Light Company, N.E. v.



Department of Revenue, 117 Ill. App.3d 911 (3<sup>rd</sup> Dist. 1983) (hereinafter referred to as “CILCO”)-and it is upon this case that “ABC” relies to support its position that the dosimeters should be exempt because their use is mandated by law. The electric company in that case had a fly ash collection station that was certified by the Environmental Protection Agency as having, as its primary purpose, pollution control, with fly ash as the pollutant. Governmental pollution control regulations governed the discharge into the atmosphere of fly ash. The company removed the contaminant from boiler hoppers and trucked it away for safe disposal. Electronic scales were purchased to weigh the trucks loaded with the ash so that the company was in compliance with highway weight requirements. The court gave the exemption to the scales because “if it were not for the environmental pollution regulations there would be no need for the scales.” *Id.* at 915 Thus, the CILCO court applied a subjective, “but for” test to determine whether equipment qualified for the exemption-that court qualified a particular piece of equipment because regulations set forth certain requirements and the equipment at issue impacted on those requirements.

The value of CILCO is questionable, since not only has no other court followed it for its determination, but, it has specifically not been followed. In Central Illinois Public Service Co. v. Department of Revenue, 158 Ill. App.3d 763 (4<sup>th</sup> Dist. 1987), the trial court granted the exemption to railway cars which were purchased for and used solely for the transport of lime and soda ash to a scrubber system, which had been certified by the EPA as a pollution control facility. The lower court used the “but for” test reasoning that ““but for environmental regulations governing sulfur dioxide emissions at the Newton

power station, CIPS would have no need for the railway cars and would not have purchased them.”” *Id.* at 766

In reversing the trial court, the appellate court addressed the dicta in CILCO which provided the “but for” analysis in granting the exemption to equipment necessary because of environmental pollution regulations, stating “[c]ase law, however, indicates that the primary purpose test applicable to pollution control facilities does not involve a “but for” analysis.” *Id.* at 768 Applying the appropriate objective, primary purpose test (*id.* at 767), the court denied the exemption to the railway cars, determining that the “primary purpose of the cars was transportation and that the ultimate pollution control was incidental.” *Id.* at 786

No other Illinois court has used CILCO’s “but for” analysis. All other courts have applied the objective, primary purpose test, as did the appellate court in Central Illinois Public Service, even when the tangible personal property for which exemption was sought was required by government regulations. See also, Shell Oil Company v. Illinois Department of Revenue, 117 Ill. App.3d 1049 (4<sup>th</sup> Dist. 1983) (denied exemption to asphalt storage tanks built, subjectively, as a result of EPA requirements concerning unacceptable levels of sulfur emissions when high and low sulfur pitch combined-objective, primary purpose was to enable taxpayer to produce asphalt from high sulfur pitch and to burn low sulfur pitch as fuel)

Nor do any of the other cases relied upon by taxpayer provide the necessary legal underpinning for its exemption claim. In Du-Mont Ventilating Company v. Department of Revenue, 73 Ill.2d 243 (1978), the pollution control facilities exemption was granted to the intake side of a push-pull ventilation system. As stated by the court, the record

showed that if the exhaust side of the system did not work, the building became pressurized. If the intake side of the system did not work, no air would be brought into the building and the exhaust side would cease to function, with the result being that air pollutants would not be exhausted. Further, if the intake side functioned alone, the air pollution in the building would merely be blown around the inside of the facility. Therefore, both the intake and the exhaust sides of the ventilation system were necessary as integral parts of the pollution control system in the facility.

Taxpayer avers that Du-Mont supports its premise that since these survey and monitoring dosimeters are part of a system that reduces or prevents air pollution, they qualify for the exemption.<sup>5</sup> However, "ABC's" argument depends on defining the air pollution in this cause as being the exposure to the excessive levels of radiation, rather than the excessive levels, itself. For the reasons stated above, the flaw in taxpayer's argument is that it incorrectly defines air pollution, thereby making its analogy to Du-Mont without merit.

Even if air pollution was defined as taxpayer avers, the dosimeters would still not qualify. Their objective, primary purpose is to record data. That data is used by persons who decide what to do with the information received, unlike the Du-Mont ventilation system that actually pulled out the polluted air. This is consistent with Illinois decisions that denied the exemption to tangible personal property that had a part in pollution control, but not as their objective, primary purpose. See Illinois Cereal Mills, Inc. v.

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<sup>5</sup> The Circuit Court, Cook County, in Gabriel Laboratories, Inc. v. Department of Revenue, 95 L 50046, denied the exemption to testing equipment used by Gabriel to test samples of air and water from its customers' facilities for purposes of analysis and reporting to governmental units. Although "ABC" correctly states that there are some distinguishing facts between Gabriel and the instant matter, that court's analysis and determination that "testing and analytical operations do not prevent, reduce or eliminate pollution" offers some support to the Department's position and as well as guidance herein. Gabriel is currently pending decision in the appellate court.

Department of Revenue, 37 Ill. App.3d 379 (4<sup>th</sup> Dist. 1976) (gas fired boiler, which replaced pollution causing coal fired boiler, had as objective, primary purpose the production of steam to dry grain and heat for the plant); Central Illinois Public Service Co. v. Department of Revenue, *supra* (railway cars, used to bring necessary minerals to the pollution control system, had as their objective, primary purpose transportation of those minerals); Shell Oil Co. v. Department of Revenue, *supra*

**WHEREFORE**, for the reasons stated above, it is my recommendation that "ABC's" Claim for Credit be denied, in its entirety.

4/29/99

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Mimi Brin  
Administrative Law Judge